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In the

Supreme Court of the United States.

October Term, 1940.

No. 824

The Columbian National Life Insurance Company,
Petitioner,

v.

Lena M. Rodgers,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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v.
LENA M. RODGERS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

To the Honorable the Justices of the Supreme Court of the United States:

The undersigned, on behalf of the above-named petitioner, pray that a writ of certiorari may issue to review the judgment of the Circuit Court of Appeals for the Tenth Circuit entered December 30, 1940 in the case between the above-named parties docketed therein as No. 2131.

Opinions Below.

No opinions were filed by the District Court. The opinion of the Circuit Court of Appeals appears at pages

115 to 119 of the Record and has been printed in 116 F. (2d) 705. A former opinion was printed in 93 F. (2d) 740.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on December 30, 1935 (R. 119). A petition for rehearing was denied February 3, 1941 (R. 137).

The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

The action to which this petition relates is an action at law removed from the State Court of Kansas on the grounds of diversity of citizenship to recover the death benefits payable under a policy of life insurance, in which the defense was fraud in the application.

Questions Presented.

Two questions are presented:

1. Where the evidence discloses that an insurer has means of discovering the falsity of a fraudulent and material misrepresentation can the federal court apply the law of estoppel by constructive notice in the face of the unanimous state decisions that that principle is not applicable where there have been fraudulent misrepresentations?

2. Where waiver solely by actual and express knowledge has been pleaded can the court render a decision on a theory of estoppel based upon constructive knowledge raised for the first time after the evidence is closed?

Statement.

The plaintiff-respondent Rodgers, beneficiary under a policy issued by the defendant-petitioner, brought a suit on

the policy within the contestable period to recover the face of the policy due upon the death of the insured. The sole defense pleaded was that the insured had falsely denied a declination by another company.* The plaintiff filed a reply claiming that the defendant had full knowledge of the declination prior to its issuance of the policy and accordingly waived or was estopped from setting up this defense. The case was tried on these issues, resulting in a verdict for the plaintiff. On appeal the Circuit Court of Appeals ruled that the evidence (all of which was by deposition) established fraud of the insured and the materiality of the misrepresentations as matter of law. Under the practice then in force it sent the case back for a new trial. 93 F. (2d) 740.

At the second trial the identical depositions were presented with no further material evidence on the question of the fraudulent and material character of the misrepresentations. It is accordingly the law of the case that on this issue the defendant is entitled to prevail. The evidence in support of the plaintiff's contention that the defendant had actual knowledge that the misrepresentations were false before it issued the policy was argued by the defendant to be insufficient, but was not passed upon by the Circuit Court of Appeals. The Circuit Court of Appeals rested its second decision solely upon the proposition that the defendant could have, and accordingly should have, ascertained the true facts, and was accordingly barred by equitable estoppel. The defendant argued before the Circuit Court of Appeals that neither the evidence nor the law justified such a decision, and further argued that this point was not open on the pleadings. In its opinion the court did not mention the procedural question although its decision directly violated a previous ruling of its own in a case removed from the same state, and did not discuss the unani-

*Material as a matter of law. *Scott* v. *National Reserve Life Ins. Co.*, 144 Kan. 224; 58 P. (2d) 1131.

mous Kansas cases cited by the defendant to the effect that no duty of inquiry and no equitable estoppel is to be raised in favor of one who has been guilty of a conscious misrepresentation. The court decided contrary to these cases by relying upon purported analogies which the Kansas Court itself has stated to be "perfectly obviously . . . of no consequence" to the issue raised in this case, thereby disregarding completely the established Kansas law.

Specification of Errors.

The Circuit Court of Appeals erred

1. In refusing to follow the decisions of the Kansas Supreme Court which have been stated by that court to be the only ones pertinent to the issue.

2. In holding that under a plea, and after a statement of counsel, that he relied upon waiver by actual knowledge, without further notice to the defendant it was open to the court to decide on a claim of equitable estoppel by constructive knowledge.

Reasons for Granting the Writ.

1. It is common knowledge that every insurance company has means of making an investigation, if it wishes to spend the time and money, to check the accuracy of statements in applications for insurance. The decision of the Circuit Court of Appeals is that a company is bound to employ such means, and cannot rely upon a conscious and deliberate material misrepresentation of the insured, where in the ordinary course of business it possessed records indicating a possibility that the statements were false, but which records were *equally consistent* with the application's entire truthfulness. *All* insurance companies possess these rec-

ords, which are furnished by a national distributing company (R. 58). No prior case is known which makes the possession of such records raise a duty of further inquiry where the records disclose *no facts inconsistent with the statements in the application.* The decision below in so holding is of extreme importance to every insurance company. It is not only unjustified by the Kansas cases, but is directly contrary to at least three applicable and unquestioned Kansas decisions.

Speed v. *Hollingsworth,* 54 Kan. 436; 38 Pac. 496.

Murray v. *Davies,* 77 Kan. 767; 94 Pac. 283.

Priest v. *Kansas City Life Ins. Co.,* 116 Kan. 421, 428.

See *Harvester Co.* v. *Hardware Co.,* 101 Kan. 488; 167 Pac. 1057.

See also *Vaughn* v. *Hixon,* 50 Kan. 773; 32 Pac. 358.

Dangerfield v. *Ry. Co.,* 62 Kan. 85; 61 Pac. 405.

The Circuit Court of Appeals should not be permitted to state that it is bound by the Kansas law, and then rely on so-called analogous cases which that court itself has stated to be "perfectly obviously . . . of no consequence" in the premises,

Smith v. *Rector,* 135 Kan. 326, 329; 10 P. (2d) 1077, 1079;

See also *Harvester Co.* v. *Hardware Co.,* supra;

and disregard the unambiguously pertinent Kansas decisions.

2. In the original petition (R. 11), in the amended reply (R. 24), and even in the opening made *after* the deposi-

tions were taken on which he subsequently relied (R. 44), plaintiff's counsel based his affirmative defense of waiver and estoppel exclusively, and at the same time elaborately, upon the claim that the defendant possessed *actual and complete knowledge* of the falsity of the insured's misrepresentation. The defendant had no warning until after the evidence was closed that the plaintiff was going to make the additional and entirely different claim of equitable estoppel based on constructive knowledge attributable to it by virtue of an alleged duty of inquiry. It was never afforded an opportunity of introducing evidence to meet this new contention.

Waiver and estoppel must be proved the way they are pleaded. This is the law of Kansas; it was the law of the Tenth Circuit until the decision below;

> *Hunter Milling Co.* v. *Koch,* (CCA-10) 82 F. (2d) 735, citing and following the Kansas decisions;

and is the law generally.

> Note, 120 A.L.R. 8, 9, 21, 105, 124.

The decision below is entirely improper under the Federal Rules of Civil Procedure, and is in conflict with apposite decisions in other circuits.

> Rule 8(c).
>
> *Carpenter* v. *Baltimore & O. R. Co.,* (CCA-6) 109 F. (2d) 375.
>
> *Horvath* v. *McCord Radiator & Mfg. Co.,* (CCA-6) 100 F. (2d) 326.
>
> *Southern Ry. Co.* v. *Montgomery,* (CCA-5) 46 F. (2d) 990.
>
> *Union Pac. R. Co.* v. *Garner,* (CCA-8) 24 F. (2d) 53.

That the defendant was materially prejudiced is apparent both from the record of the trial and from the affidavits filed thereafter (R. 131-5).

Wherefore it is respectfully submitted that the petition should be granted.

FREDERICK H. NASH,
Attorney for Petitioner.

LATHROP, CRANE, REYNOLDS, SAWYER & MERSEREAU,
CHOATE, HALL & STEWART,
Of Counsel.

Dated Boston, Massachusetts March 6, 1941.